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IN THE

Supreme Court of the United States

October Term, 1966

No. 988

STEVEN ETIENNE PSHEMENSKY,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE DISTRICT COURT OF APPEAL 2nd APPELLATE DISTRICT, STATE OF CALIFORNIA.

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Comes now Steven Etienne Pshemensky and petitions this honorable court for a Writ of Certiorari directed to the District Court of Appeal, 2nd Appellate District, State of California and prays that a Writ of Certiorari issues to review the judgment of the District Court of Appeal, 2nd Appellate District, State of California entered in the above case. Decision rendered August 10, 1966. Petition for Hearing in the Supreme Court denied.

OPINIONS

The opinions below are attached hereto in Appendix A.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1257 United States Code and by the Sixth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are set forth in Appendix B hereto are: THE SIXTH AND FOURTEENTH Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was charged in the Information of the crime of Murder, in violation of Section 187 of the Penal Code of California, on or about the 25th day of September 1964. (C.T. p. 66). Information was amended to the crime of Involuntary Manslaughter in violation of Section 192 of the Penal Code of California. (C.T. p. 67). On December 16, 1964 the above matter came to trial, jury waived. On December 21, 1964, Court adjudges defendant "Guilty" as charged (involuntary manslaughter). (C.T. pp. 75-77). A probation report ordered. Motion for a new trial denied on April

15, 1965. (C.T. p. 83). Defendant was placed on probation for 10 years, spend the first six months in the County jail and pay a fine of $3,000.00 plus penalty assessment. A Notice of Appeal was filed on April 15, 1965. Bail set at $2,500.00 Defendant was released. (C.T. p. 83).

At the preliminary hearing held on October 15, 1964 the Federal question in violation of the Sixth Amendment was properly raised for failure of the police officers to advise defendant of his rights. (R.T. Oct. 15, 1964 pp. 40, 41). In the Appeallate Court the method of raising the federal question was presented in the Opening Brief on Appeal by assignment of errors. (Opening Brief p. 6). In the Petition for Hearing in the Supreme Court of California (pp. 4, 5).

QUESTIONS PRESENTED

1. Whether appellant was denied his constitutional rights under the Sixth Amendment to the Constitution of the United States, as made obligatory by the Fourteenth Amendment, in that there was a failure by the police officers to advise him of his rights.

2. Whether appellant's rights agains self-crimination under the Sixth Amendment to the Constitution of the United States were violated.

3. Whether an illegal search and seizure in violation of appellant's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States was violated.

4. Whether the errors and admissions in the District Court's Opinion were erroneous and prejudicial.

REASONS WHY WRIT SHOULD BE GRANTED

The investigation conducted by the police at the home of defendant, and the line of questioning followed by the police, was no longer a general inquiry into to the unsolved crime. Defendant became a prime suspect, accused by the police as to the killing. The accusatory stage had been reached.

The police carried out a process of interrogation that lent itself to elicite incriminating statements. Defendant had an absolute, constitutional right to remain silent, and the record is clear that at the time of coming to defendant's house and pursuing an investigation that was no longer a general inquiry and in which the defendant became a prime suspect, the police did not inform defendant at that time of his right to counsel or of his right to remain silent, and no evidence establishes that the defendant waived these rights.

Officer Moore, on cross examination, testified:

"Q. Now, you did most of the questioning out there of Mr. Pshemensky, didn't you?

"A. Yes some of it, yes.

"Q. Well, from the time you arrived until the time you left with him to go down to the station, you never did inform him he had a right to counsel, did you?

"A. He was informed at the station.

"Q. What!

"A. He was informed at the station.

"Q. I would like you to answer my question.

"A. Go ahead, Sir, again.

"Q. You never did inform him he had the right to counsel?

"A. No.

"Q. You never did tell him that he could remain silent?

"A. No.

"Q. You never told him whatever he might say could be held against him!

"A. Not at his residence, no."

(Prel. Tr. 40-41)

The court cannot penalize a defendant who, not understanding his constitutional rights, does not formally request the aid of counsel, and though defendant can waive his right to counsel, no waiver can be found absent evidence that defendant knew of his right.

There can be no doubt, in the instant case, that defendant was unaware, and uninformed, of his constitutional rights.

People v. Dorado (1965) 62 A.C. 350.

Police officers, investigating the firing of a shot in the vicinity of defendant's home, knocked at defen-

dant's door. Officers Moore and Phels identified themselves as police officers and all of the officers entered defendant's apartment.

While Officers Moore and Phelps interrogated defendant, other police officers, without a search warrant, were searching defendant's home. In reply to the questions of the interrogating officers, defendant stated that he did own several rifles and hand guns and, at their request, he showed them a .22 rifle which he owned.

The general rule is that an incidental search must be contemporaneous with an arrest; that it can only be made after the arrest.

Lee v. United States, 232 F. 2d 354.

It is stated in *Chapman v. United States,* 365 U.S. 610:

> "Until *Agnello v. U.S.,* 269 U.S. 20, this court had never directly decided, but had always assumed, 'that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein.' . . . but that case explicitly decided that '"Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are . . . unlawful notwithstanding facts unquestionably showing probable cause"'."

Under federal laws, no search of a private residence without a warrant can ever be justified, and is a violation of defendant's constitutional rights under the Fourteenth Amendment to the Constitution of the United States.

United States v. Rembert, 284 F. 996.

In this case it was stated that defendant voluntarily "gave" the officers his .22 caliber rifle. However, at the time defendant was being interrogated and other officers were searching his home.

It is the right of one faced with authority to submit and to reserve his defenses for the courts. An inference of consent from a failure to engage in a discussion as to the officer's authority is not warranted. Consent cannot be found from submissiveness or the neglect or failure to argue with a police officer. In fact, intimidation and duress are almost necessarily implicit in such situations.

Higgins v. United States, 333 U.S. 10.

Because consent involves waiver of basic constitutional rights, "courts indulge every reasonable presumption against waiver of fundamental constitutional rights."

Johnson v. Zerbst, 304 U.S. 458.

The opinion of the District Court of Appeal reveals many errors which were prejudicial to petitioner.

The Court has stated that the record does not disclose and inquiry as to the physical nature of the wifes field of vision. The Reporter's transcript will bear out that she was examined as to her vision. (Opinion p. 4). On the question of whether the stage had become accusatory in nature (Opinion p. 7, 8) the Court again said, assuming that the investigation had become accusatorial in nature prior to his arrest and prior to the time he was advised concerning his constitutional rights. The law is clear that when the accusatory stage has been reached, the defendant must be advised of his constitutional rights in full. The Court cannot assume that whatever was said did not prejudice the defendant.

CONCLUSION

For the reasons set forth above we pray that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

AL MATTHEWS,

Attorney for Petitioner.

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. STEVEN ETIENNE PSHEMENSKY, Defendant and Appellant.	2nd Crim. No. 11241

[Filed August 10, 1965, Dist. Court of Appeal — Second Dist., J. T. Alley, Clerk].

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur L. Alarcon, Judge. Judgment affirmed.

Al Matthews, for Defendant and Appellant.

Thomas C. Lynch, Attorney General; Albert W. Harris, Jr. Assistant Attorney General; and Michael R. Marron, Deputy Attorney General, for Plaintiff and Respondent.

Defendant appeals from the judgment convicting him of involuntary manslaughter,[1] and argues (1) that the evidence is legally insufficient to support the judgment; (2) that evidence obtained by means of an illegal search and seizure was improperly admitted; and (3) that evidence as to his statements to the police was received in violation of the rules enunciated in *People v. Dorado,* 62 Cal. 2d 338. We find no merit in these contentions.

Pursuant to stipulation a jury trial was waived and the case was submitted to the trial court upon the evidence taken at the preliminary hearing and the additional testimony introduced by the prosecution and by the defendant at the trial.

The evidence establishes that on the afternoon of September 25, 1964, one Harry Torrey was killed by a bullet fired from appellant's .22 caliber Winchester rifle. The bullet struck the decedent in the neck while he was repairing a television antenna on the roof of an apartment building located in the heavily populated Hollywood area. Appellant at all times freely admitted that on occasion he had fired his rifle at the birds which frequented an avocado tree standing in the direct line of sight between the sun porch of his apartment and the roof of the building on which Mr. Torrey met his death. By way of defense appellant testified that although he had killed birds both on the

[1]Penal Code, section 192, subd. 2.

morning and afternoon of the day following the homicide, he had not fired the rifle on the previous day. He further testified that although he had a large supply of regular .22 caliber ammunition in his apartment, he had used a special "weak-charge" cap when he fired the weapon into the out-of-door airspace in the vicinity of his sun porch.

The coroner's report indicates that Mr. Torrey was killed some time between 12:30 p.m. and 4:30 p.m. during the afternoon of September 25, 1964. The decedent's wife testified that she went up to the roof at approximately 4:15 p.m. to call Mr. Torrey to dinner but did not see him. Later, around 5 p.m., when she became concerned because they had scheduled dinner for 4:30, she again went up to the roof and then discovered his dead body. Appellant offered alibi testimony concerning his activities during the period from approximately 3:45 until after 5 p.m. which, if accepted by the trier of fact as true, would have tended to prove that he had not been in his apartment to fire the fatal shot during that period of time.

It is immediately apparent that appellant's contention regarding the sufficiency of the evidence presents nothing for appellate review. "Each defendant called several witnesses in his behalf in an attempt to establish an alibi. It is apparent the [trier of fact] did not believe these witnesses or the defendants' version of where they were at the time of the commission of the [homicide]. 'The weight to be given to the testimony

of the witnesses, whether in support of an alibi or otherwise, and their credibility, present questions for the determination of the [trier of fact] which is binding upon this court on appeal. [Citation.]'" (*People v. Johnson,* 210 Cal. App. 2d 273, 276; see also, *People v. Williams,* 53 Cal. 2d 299, 303.)

In addition, appellant's defense of alibi is founded entirely upon the assumption, unwarranted for purposes of appellate review, that because the decedent's wife testified that her husband wasn't on the roof at 4:15 p.m., it must be taken as a conclusively established fact that his death occurred after that time. The fallacy of this assumption is apparent. The record discloses no inquiry to show the physical nature of the wife's field of vision or the extent or nature of her observations upon the roof during either of her two trips thereto. It is more than a possibility that a person might fail to observe a body lying in a not-to-be-expected supine position upon a roof and reach a natural conclusion that "he was not there." Obviously, however, such a testimonial conclusion would prove only that the witness had not observed the body.

In the instant case the trial judge, with appellant's consent and in his presence, made a visual inspection of the premises as authorized by section 1119 of the Penal Code. From this inspection the court, in its capacity as trier of the fact, might have concluded either that the decedent's wife of necessity would have seen the body if she had looked out upon the roof or that, on

the contrary, not expecting such a condition, she might well have failed to observe it. As stated in *Key v. McCabe,* 54 Cal. 2d 736, 739:

"In addition to the above evidence sustaining the findings of the trial court, the trial judge, before making his findings, viewed the premises and property in question. This view constituted substantial evidence in support of the questioned findings, the rule being established that the trier of fact's view of an area is independent evidence which can be considered by him in arriving at his conclusion and is substantial evidence in support of findings consonant therewith. [Citations.]"

However, we need not resort to the evidence presumptively supplied by the court's view of the premises to establish adequate support for the implied findings of the court in the instant case because, as indicated, it was entirely within the province of the trier of the fact to evaluate and accept or reject the accuracy and reliability of the estimates of time made by the witnesses called for the purpose of proving appellant's alibi.

Appellant's arguments regarding the impropriety of the conduct of the police in connection with their investigation of this matter are entirely without merit. On the afternoon following the killing, a man who lived next door to appellant heard a rifle shot and saw feathers falling from the top of the avocado tree at the rear of appellant's residence. He became frightened

and telephoned the police. In response to this call, the police went to the indicated location to investigate. Upon finding two dead birds in the garbage can behind the building occupied by appellant, together with a letter with appellant's address upon it, the police quite properly went to appellant's apartment to investigate further. (*People v. Michael,* 45 Cal. 2d 751, 753-754.)

It is undisputed that after the officers identified themselves, appellant readily invited them in and voluntarily produced his .22 caliber rifle and ammunition for their inspection. It is doubtful that any search is disclosed by the facts of the instant case, but, in any event, appellant's voluntary and unqualified consent thereto is clearly shown by the evidence. (*People v. Carrillo,* 64 A.C. 402, 407.)

Appellant made no incriminating statments during the investigation conducted at his house other than to indicate his ownership of the guns and the ammunition which he voluntarily showed to the investigating officers. He denied firing the gun on the day in question and he denied that he had used regular .22 caliber ammunition at any time while firing at birds outside his house. He repeated these same statements after he had conferred with his counsel and again at the trial. This record shows no violation of the rule enunciated in *People v. Dorado, supra,* 62 Cal. 2d 338. Moreover, assuming that the investigation had become accusatorial

in nature prior to his actual arrest and prior to the time he was advised concerning his constitutional rights, nevertheless it is obvious that no possible prejudice could result from evidence of statements which were consistent with his defense and which he reiterated in his testimony at the trial. (*People v. Mathis,* 63 Cal. 2d 416, 432-433.)

The judgment is affirmed.

HERNDON, J.

We concur:

ROTH, P.J.

FLEMING, J.

APPENDIX B

AMENDMENT VI—JURY TRIAL FOR CRIMES. AND PROCEDURAL RIGHTS.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witneses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT.

Section 1. All persons born or naturalized in the United States, and Subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in quesion on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.